No. 15468

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSE RAMIREZ, MEYER GOODMAN, MICHAEL GULLON, BILL H. FREEMAN and ROBERT E. MILLER,

Appellants,

vs.

REFUGIO GONZALEZ LOZOYA,

Appellee.

BRIEF OF APPELLANTS.

LAUGHLIN E. WATERS,
United States Attorney,

LLOYD F. DUNN,
Assistant U. S. Attorney,
Chief of Criminal Division,

JOSEPH F. BENDER,
Assistant U. S. Attorney,

600 Federal Building,
Los Angeles 12, California,

Attorneys for Appellants

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Rules

No. 15468

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSE RAMIREZ, MEYER GOODMAN, MICHAEL GULLON, BILL H. FREEMAN and ROBERT E. MILLER,

Appellants,

vs.

REFUGIO GONZALEZ LOZOYA,

Appellee.

BRIEF OF APPELLANTS.

I.
JURISDICTIONAL STATEMENT.

The District Court has jurisdiction to grant injunctions under Rule 65 of the Federal Rules of Civil Procedure, and this Court has jurisdiction to entertain the appeal and review the permanent injunction under the provisions of Title 28, Sections 1291 and 1294 of the United States Code.

II.
STATEMENT OF THE CASE.

A. Facts.

On May 29, 1956, the Federal Grand Jury for the Southern District of California returned a two count indictment against Refugio Gonzalez Lozoya charging transfer without a written order of approximately nine and one-half pounds of marijuana in count one, as pro-

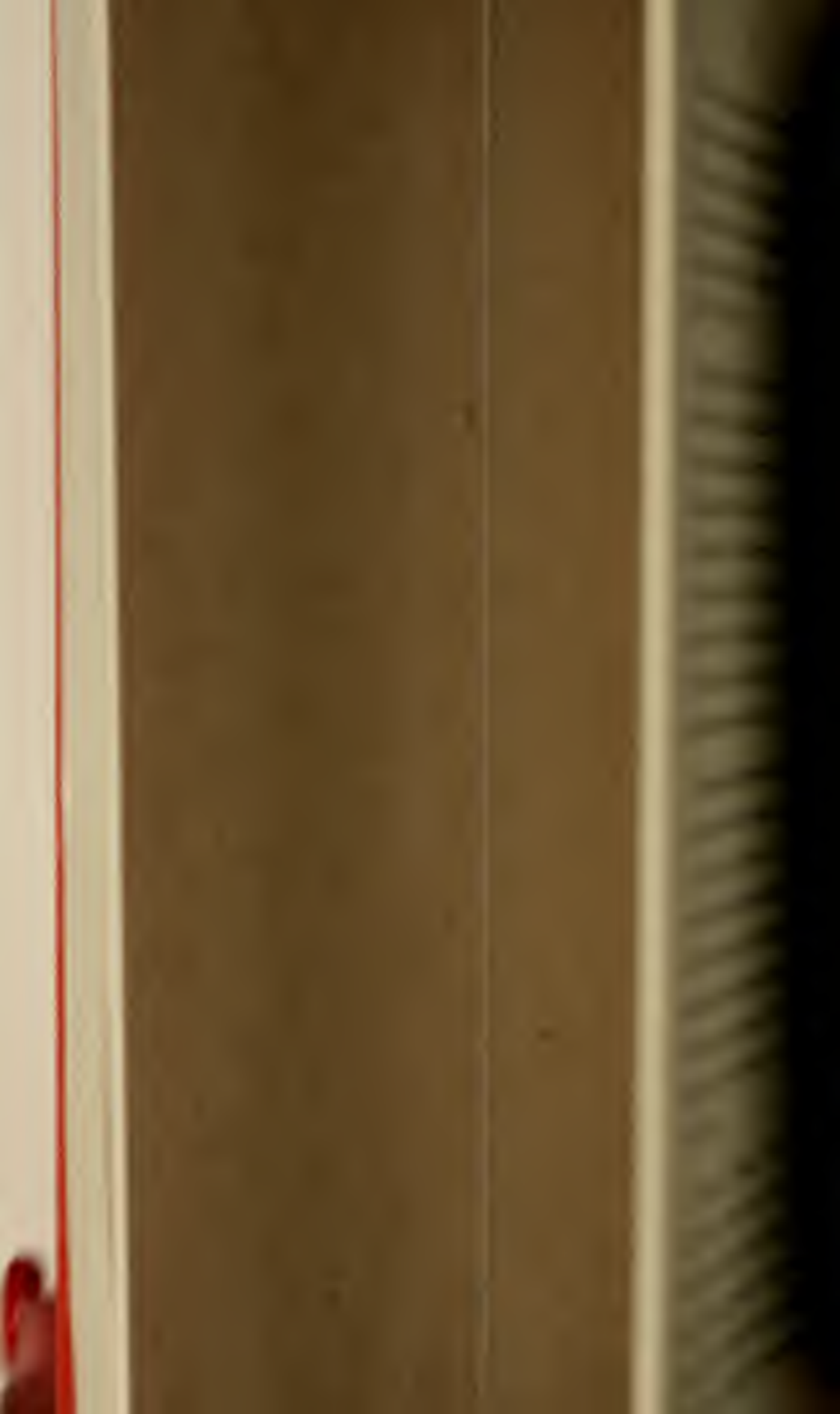

TABLE OF AUTHORITIES CITED

Cases

Rules

STATUTES PAGE

No. 15468

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSE RAMIREZ, MEYER GOODMAN, MICHAEL GULLON, BILL H. FREEMAN and ROBERT E. MILLER,

Appellants,

vs.

REFUGIO GONZALEZ LOZOYA,

Appellee.

BRIEF OF APPELLANTS.

I.
JURISDICTIONAL STATEMENT.

The District Court has jurisdiction to grant injunctions under Rule 65 of the Federal Rules of Civil Procedure, and this Court has jurisdiction to entertain the appeal and review the permanent injunction under the provisions of Title 28, Sections 1291 and 1294 of the United States Code.

II.
STATEMENT OF THE CASE.

A. Facts.

On May 29, 1956, the Federal Grand Jury for the Southern District of California returned a two count indictment against Refugio Gonzalez Lozoya charging transfer without a written order of approximately nine and one-half pounds of marijuana in count one, as pro-

scribed by United States Code, Title 26, Section 4742(a), and acquisition of the marijuana without payment of the federal tax, in count two, in violation of United States Code, Title 26, Section 4744(a).

Lozoya was arraigned June 4, 1956, entered a plea of not guilty on June 11, 1956, and the matter was set for trial July 17, 1956. On July 17, 1956, Lozoya waived his right to trial by jury, the government consented and the Court, the Honorable Thurmond Clarke presiding, approved the waiver. Trial commenced July 17, 1956, continued July 18, 19, and concluded on July 20, 1956. The five appellants, Federal Narcotic Agents, each testified as witnesses for the government to their observation of the sale and transfer by Lozoya of a gunny sack, which contained marijuana, from the trunk of his automobile into the trunk of the government vehicle of then undisclosed narcotic agent Ramirez, in the daylight, at the Beverly Ranch Market in Montebello, California, on May 17, 1956.

Lozoya testified that he did not remove the sack from his trunk or place it in the government vehicle and that no one else opened or took anything from his trunk or placed anything in the government trunk in his presence before his arrest at the market. Mrs. Macias testified as a witness for the defense, that she was doing her dishes and would look out of the window on occasions [Tr. of Rec. p. 443] and did not see the trunk of Lozoya's car lifted up at any time and that she saw no one carry a bag from the trunk of one car to the other [Tr. of Rec. p. 424].

The government argued in part that "Agent Ramirez testified unequivocally to the transfer of this bag by the defendant from his car to the government car. Agent

Goodman observed it, Agent Gullon observed it, and Agent Freeman observed the lid of the trunk go up, before Agent Freeman started his route through the market to take up his position for the arrest . . ." and "The defendant having transported and transferred this marijuana into the government car is guilty as charged" [Tr. of Rec. pp. 453-454].

The Court stated:

> "Mr. Marcus, you don't need to comment, because the Court has made up its mind. I feel, in view of the denial by the defendant and no further proof, the defendant is entitled to the benefit of the presumption. The Court will find the defendant not guilty on both counts." [Tr. of Rec. p. 454.]

On cross-examination Agent Gullon testified that after the arrest Lozoya was taken to the interrogation room of the Bureau. Agent Gullon was the only agent in the room with Lozoya. Gullon attempted to take the fingerprints of Lozoya who resisted and pushed Gullon [Tr. of Rec. p. 359] and they exchanged blows [Tr. of Rec. p. 364]. Gullon struck Lozoya two or three times with his fist [Tr. of Rec. p. 355], subdued him and handcuffed him to the chair in the interrogation room [Tr. of Rec. p. 359]. At the time Gullon fought with Lozoya no one else came into the room [Tr. of Rec. p. 363. Agent Freeman testified that Agent Gullon told Freeman he had to strike Lozoya [Tr. of Rec. p. 391]. Lozoya testified that Gullon never asked to take fingerprints [Tr. of Rec. p. 426], that he did not push Gullon [Tr. of Rec. p. 427] that without any conversation Gullon started slapping Lozoya around right away and said that if Lozoya did not tell where he had obtained the marijuana, he, Agent Gullon, was going to kill Lozoya [Tr. of Rec. p. 409].

Lozoya also testified he was knocked down and that two officers struck him in succession [Tr. of Rec. p. 410]. Lozoya testified that after Gullon ceased that Agent Miller came in and without asking any questions, just walked around a little and surveyed Lozoya for a while and then started striking him, knocked him down and kicked him [Tr. of Rec. p. 410]. Agent Miller denied that he ever struck Lozoya [Tr. of Rec. p. 451].

Subsequent to acquittal, and on Friday, January 4, 1957, Lozoya filed a petition in the originally captioned criminal proceedings [Tr. of Rec. p. 25, *et seq.*] which recites that on August 10, 1956, the State of California charged Lozoya with illegal possession of contraband marijuana in violation of Section 11500 of the Health and Safety Code of the State of California and that the preliminary hearing was set for Friday, January 11, 1957, in the Municipal Court. The petition recited that the second pending prosecution caused Lozoya "to be twice placed in jeopardy for the same identical and necessarily included offense in the Federal and State Courts" [Tr. of Rec. p. 33].

Petitioner contended that the actions of appellants caused petitioner "to be deprived of due process of law in violation of the Fifth and Fourteenth Amendments" [Tr. of Rec. p. 32].

Petitioner sought an order enjoining appellants from testifying in the Municipal Court proceedings or any other proceedings founded upon the same charge, and an

order directing appellants to return the contraband marijuana to the Clerk of the Federal Court.

The Honorable Thurmond Clarke issued an Order to Show Cause why said petition should not be granted, set the matter for hearing Thursday morning, January 10, 1957, and shortened time for service on appellants to Tuesday, January 8, 1957 [Tr. of Rec. pp. 24-25].

The Order to Show Cause was served personally on appellants Ramirez, Goodman and Freeman on January 7, 1957, prior to the date set for hearing. It was not served on appellants Gullon and Miller [Tr. of Rec. pp. 48-50].

On Wednesday, January 9, 1957, the second day after service on some appellants and one day before the hearing, the United States Attorney filed a brief in opposition to said Order to Show Cause, on behalf of appellants [Tr. of Rec. p. 36, *et seq.*].

At the hearing on January 10, 1957, no evidence was offered or received.

The Court stated it had worked very hard on the matter all week-end [Tr. of Rec. pp. 462 and 464], meaning the week-end of January 5 and 6, 1957.

The Court stated it had prepared a written order and intended to file a written opinion [Tr. of Rec. p. 463].

The Court did not read or consider appellant's brief prior to preparation of the written injunction order or hearing and received the brief in opposition during the oral argument to the Court by counsel for appellants at

the hearing on January 10, 1957. The brief was timely filed in compliance with local rule 3(d) [see Tr. of Rec. pp. 461 and 464].

The Court stated the basis for its injunction to be that:

> "This Court feels on this matter of the Order to Show Cause that when the Court has tried this defendant and acquitted the defendant, that should end the matter." [Tr. of Rec. p. 465.]

The Court iterated its position, stating:

> "Well, I feel that the defendant having been tried in the Federal Court and having been acquitted, that should end the matter. That is the view of the Court." [Tr. of Rec. p. 465.]

The Court then read a portion of its order enjoining appellants. The written order recited that Lozoya was deprived of due process of law and of the American tradition of fair play that included beatings and torture by Agents Ramirez, Goodman, Gullon, Freeman and Miller. It permanently enjoined appellants and each of them, from testifying anywhere concerning the matter; purportedly enjoined all persons including the State Court of California from ordering and compelling the agents to testify; and ordered the marijuana returned to the Clerk of the Federal Court [Tr. of Rec. pp. 44-45; *Cf.* pp. 465-466].

From the aforesaid permanent injunction, appellants appeal.

B. Questions Involved.

This appeal raises the question of whether or not a Federal District Court after acquittal of defendant, may enjoin the witnesses who are Federal Narcotic Agents, from testifying and enjoin the State Court from compelling the agents to testify in a prospective State prosecution of defendant for an offense against the State law arising out of the same factual circumstances for which defendant was tried in the Federal Court, where no evidence was obtained unlawfully by the agents and no motion to suppress evidence on any purported basis was ever made in the Federal Court before or during trial or before defendant was acquitted.

Germane to this issue are contentions by the appellants that double jeopardy does not arise when defendant is to be tried a second time for a different offense; that defendant is not in second or double jeopardy until actually brought to trial for the second time; that former jeopardy is a defense which may only be asserted at the second prosecution; that the defense, former jeopardy, can only be presented in the State forum where defendant is to be tried and cannot be raised initially in the Federal District Court where defendant was first in jeopardy, but only once in jeopardy; that the supervisory powers of the Federal Court over Federal Agents, as in the *Rea* case, have no application where defendant never contended that it was his marijuana or that it was obtained by unlawful search and seizure or that a confession or any admission was obtained by the purported beating; that after Federal ac-

quittal and proper withdrawal of the marijuana from evidence the District Court had no authority to order the marijuana back into custody of the clerk; that the injunction is void as to appellants Gullon and Miller who were not served with notice of the injunction hearing below; that the Court below deprived all five appellants of their right to a fair hearing by preparation of the written injunction order before the hearing, before receipt of the appellants' brief in opposition which was timely filed, and without the taking of any evidence at said hearing; that the Court below made a finding of beatings and torture by appellants although Lozoya's petition did not refer to alleged beatings and torture by inference or at all; that there was no evidence offered at said hearing of purported beating or torture; that there was not one scintilla of evidence during the trial or at all that three of the appellants, Agents Ramirez, Goodman or Freeman participated in any alleged beating or torture of Lozoya or were even present during any such alleged misconduct; that the incident in which Lozoya refused to be fingerprinted, with the ensuing scuffle and striking of Lozoya, occured after the sale and delivery of the marijuana and just before he was booked in the County Jail so that no testimony of events which occurred before the scuffle should be enjoined on any theory; that no one tortured Lozoya for any purpose and no evidence was alleged to have been obtained as a result of beatings or torture.

III.
SPECIFICATION OF ERRORS.

1. Appellee is not subjected to double jeopardy by threatened prosecution by the State of California, merely because he has been acquitted of a related crime in the Federal courts.

2. Appellee is not subjected to double jeopardy by threatened prosecution by the State of California, even though acquitted of a related Federal crime, where different offenses are charged and different facts are necessary to a conviction under each statute.

3. The order appealed from is void as to certain appellants not served with notice of the hearing below.

4. The marijuana seized by the narcotics agents from appellee Lozoya, and admitted by the Court below, is legal, competent evidence.

5. The order appealed from is not supported by the evidence.

6. The order appealed from is not supported by, nor responsive to, appellee's petition.

7. The Court below deprived appellants of their right to a fair hearing.

8. The allegations of torture in the order appealed from are not supported by the evidence.

9. The allegations of the order that appellee was subjected to beating by appellants are not supported in any way by the evidence as to certain appellants.

10. The alleged beatings administered by the appellants are alleged to have occurred subsequent to the seizure of the marijuana, and have no bearing on the commission of the crime charged.

IV.
ARGUMENT.

The District Court abused its discretion in issuing the injunction since there in fact occurred no deprivation of any constitutional right of Lozoya and no violation of any federal law or rule pertaining to searches, seizures, or process. The acquittal in federal court created in Lozoya no immunity to prosecution by the State for violation of its laws. The State Court not the Federal District Court should decide whether the State law has been violated and whether Lozoya may be tried and convicted there. The Federal acquittal gives rise to no right or equity to permit the issuance of an order restraining the appellants from testifying in the State prosecution and no right for the Federal District Court to enjoin the State Court from subpoenaing and compelling the federal agents to testify in the state proceedings.

Glaring anomalies are present between the evidence adduced during the federal trial of Lozoya, the petition of Lozoya to enjoin appellants, the hearing, and the injunction.

The petition asserted the double jeopardy of Lozoya. The trial court stated at the hearing that it was issuing the injunction because the federal trial and acquittal should end the matter. Yet the prepared written injunction did not allude to double or former jeopardy.

On the other hand, the petition did not mention an alleged beating or torture of Lozoya, but the injunction recited that Lozoya was beaten and tortured by appellants.

As for the marijuana, Lozoya never claimed it to be his and never made a motion to suppress it on the ground

of unlawful search and seizure, as done in the *Rea* case, or on any other ground. In fact, the court admitted the marijuana into evidence at the trial. Other than being deemed in the custody of the court to resist an action by the defendant to replevy the contraband, the court had no right of control of the marijuana subsequent to acquittal of Lozoya and withdrawal of the evidence from the custody of the clerk in accordance with federal local court rules concerning withdrawal of evidence after trial. Only the Secretary of the Treasury may destroy or order destruction of the marijuana which he presently may not do while the bag of marijuana gathers dust in the vault of the clerk of the court.

Another anomaly appears in that the petition did not pray that the Federal District Court enjoin the State Court, yet the injunction purports to do so. Without notice or hearing, without any showing of knowledge of the hearing or representation by counsel, the Honorable Thurmond Clarke enjoined all persons including the State Court Judge or Judges from ordering and compelling the appellants to testify as witnesses in the anticipated State prosecution of Lozoya. In this regard, during the hearing the Court below stated that the problem of appellants being cited for contempt by the State Court was not before the Federal Court [Tr. of Rec. p. 463].

The Supreme Court of the United States has indicated that the Federal Court should not restrain the State Court in relitigation cases, *Toucey v. New York Life Ins. Co.,* 314 U. S. 118. Although *Toucey* is a civil case, the parallel with Lozoya is apparent. Although involving a State prosecution and State officer only, *Stefanelli v. Minard,* 342 U. S. 117, is of interest. There, the appellate court held that the District Court had correctly refused to en-

join State officers from prosecuting the defendant with the aid of illegally obtained evidence. The court stated: "The consequences of exercising the equitable power here invoked are not the concern of a merely doctrinaire alertness to protect the proper sphere of the States in enforcing their criminal law. If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law—with its far-flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this Court, to determine the issued. Asserted unconstitutionality in the impaneling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trail court—all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts. To suggest these difficulties is to recognize their solution. (342 U. S. at 123-124.)

A major basis of the decision in *Stefanelli* was the consideration that the discretion in question involved the intrusion of the federal courts into the administration of State criminal law. In *Rea,* as in the instant matter, federal officers were involved and therefore the matter went beyond the administration of State criminal law, but, as subsequently pointed out in greater particularity, *Rea* involved illegally seized evidence, an essential element not present here.

It further appears that no evidence was received at the hearing in *re* Order to Show Cause and there is

no evidence to support the injunction. If the testimony from the prior federal trial of Lozoya was amenable to being placed before the federal court for its consideration at the hearing, by motion therefore, no such motion was made. Accordingly, there was no evidence at all before the court at the hearing concerning alleged beating or torture of Lozoya.

If the evidence elicited at the prior trial had been properly before the court at the hearing the trial court nevertheless should have afforded appellants a fair and impartial hearing, by reading and considering the authorities cited by appellants in their brief in opposition, before preparation by the court of the written injunction or at least before issuance of the injunction.

There was simply no evidence anywhere and no contention by anyone, prior to the finding in the permanent injunction, to the effect that appellants Ramirez, Goodman or Freeman were participants or were in any manner involved in the alleged beating of Lozoya. Will the beacon of Appellate justice permit the gratuitous branding by the trial court of these three appellants as beaters and torturers of Lozoya to forever blight their reputation and sully their record. The Appellate Court should not countenance this departure from the requirement that an injunction be supported by evidence.

Agent Ramirez was the chief government witness so apropos of the statement of the court that it believed the matter should end without trial of Lozoya by the State, the trial court had to enjoin Ramirez to prevent prosecution by the State which otherwise could have proceeded with or without the appearance of appellants Gullon and Miller as witnesses.

Appellant Gullon testified that Lozoya resisted the attempt to take his fingerprints, a scuffle ensued and Gullon struck Lozoya two or three times. It may be asserted by appellants that Lozoya had no right to refuse to submit to the taking of his fingerprints and that reasonable force was permissible to effectuate the taking of the prints, or it could be contended that the resistance by Lozoya was interpreted by appellant Gullon as the incipient intention of Lozoya to escape, which intention Gullon throttled and then handcuffed Lozoya to a chair. But it is not necessary to inquire into these possibilities to justify acquisition of evidence because no evidence was obtained as a result of the scuffle. No allegation has been made and no evidence was introduced at any time to show that Lozoya was physically or otherwise mistreated into confessing or admitting anything.

Lozoya has not pointed to any specific federal right of which he might be deprived if local prosecution continues, with the testimony of the federal agents and use of the marijuana.

This court is of course conversant with *Rea v. United States*, 350 U. S. 214, wherein the Supreme Court held that where a federal agent has violated the federal rules governing searches and seizures, the District Court should enforce the rules by enjoining the agent from using the fruits of his unlawful act, in State as well as Federal proceedings. In the *Rea* case the evidence was seized under an improperly issued search warrant so that the evidence was unlawfully obtained. But the differences between the facts in the *Rea* case and in the instant Lozoya matter make the *Rea* case almost wholly inapposite. In the *Rea* case the evidence was seized in violation of Rule 41(b) of the Rules of Criminal Procedure

and the District Court in the initial federal proceeding granted the motion to suppress the evidence and the indictment was dismissed. In Lozoya no allegation of unlawful search or seizure or arrest was ever made and no motion was ever made to suppress the evidence. Although the marijuana was admitted into evidence, Lozoya has at all times claimed that the narcotic was not his and that he knew nothing whatsoever about it. Further, Lozoya made no claim of any impropriety on the part of any federal agent until the State prosecution was instituted. Then the only claim was that the second prosecution violated the Fifth and Fourteenth Amendment rights of Lozoya because, having been acquitted in federal court, Lozoya should not be prosecuted in State court.

In this regard, one act may constitute an offense against two sovereignties for which each may prosecute. (*United States v. Ah Hung,* 243 Fed. 762.) Existing federal law does not require that the two sovereignties prosecute different offenses arising out of the same acts. (*United States v. Lanza,* 260 U. S. 377, 383, 385.) However, if the law were to require different offenses the requirement is met as each sovereign here has charged a different offense. In the federal case, unlawful acquisition without payment of the tax, and transfer without a written order, of marijuana, was charged whereas the State charged unlawful possession of marijuana. Accordingly, even if the two sovereignties rule were not extant, no element of double jeopardy would be present here.

The rationale of the *Rea* case was not based upon double jeopardy; there was no possible double jeopardy in the *Rea* case as defendant there was never in jeopardy in the federal proceedings. The evidence was suppressed

by the Federal Court and defendant was never brought to federal trial hence never placed in jeopardy.

In the Lozoya case, Lozoya was placed in jeopardy in the federal proceedings. A second and subsequent prosecution of Lozoya by the same federal sovereignty for the same offenses would have placed Lozoya in double jeopardy and the defense, former jeopardy would have been properly raised under these hypothetical circumstances. But Lozoya was not prosecuted a second time by the same sovereign; he was not prosecuted for the same offense and his prosecution by the State had not yet placed him in jeopardy there, so that if the defense of former jeopardy were to be asserted in the State court it would be premature. See *In re Rufugio Gonzalez Lozoya,* on Habeas Corpus, 146 Cal. App. 2d 702, decided December 10, 1956, by the District Court of Appeal of the State of California which holds that the Appellate Court will not try any of the defenses in advance which may be available to petitioner should he be brought to trial; that all of his defenses must be presented in the proper manner at the proper time and that the fact, if it be a fact, that the defense of once in jeopardy is available to petitioner does not afford any grounds for petitioner's release on habeas corpus, citing *In re Collins,* 151 Cal. 340, 350.

The defense, former jeopardy, was erroneously asserted by Lozoya in the federal forum where no second, prosecution was ever pending. Surely the court, whether state or federal, wherein an alleged prosecution is pending is the only court where the defense of former jeopardy may be asserted and then it may be properly considered when defendant has actually been placed in second jeopardy by commencing trial.

If for the purposes of argument only it be assumed that the incredible testimony of Lozoya is true and that appellants Gullon and Miller, as testified to by Lozoya, beat him in succession without asking any questions [Tr. of Rec. p. 410], and that these appellants, or one of them, beat Lozoya to elicit a confession from him and not to prevent his possible escape or to force him to submit to the taking of his fingerprints, this would have been grievous reprehensible conduct not countenanced by this court or counsel. It would have resulted in a civil rights prosecution of the person or persons who beat Lozoya but it would still not provide the basis for the Federal Court to enjoin the agent or agents from testifying in Federal as well as State Court. If not, why was there no attempt by Lozoya's able and competent counsel before or at least during the federal trial to prevent the receipt of or to strike the testimony of said agents, appellants Gullon and Miller. Further, if an involuntary confession or any admission had been obtained, in this hypothetical situation given, neither a confession nor an admission would be competent evidence. With our feet back on the ground, the Lozoya transcript of record shows no confession or admission was elicited from Lozoya responsive to the alleged beating. Surely, whether or not on appeal this court believes that one or that two appellants did or did not wrongfully beat Lozoya is not the issue before the court because no evidence was allegedly obtained thereby. On analogy, if a man criminally assaulted a child and upon being apprehended was beaten by one of the arresting officers who had become incensed at the enormity of the man's crime, no court should acquit the man of the assault on the child or enjoin testimony of the assault on the child merely because

of the unwarranted beating by the officer. To do so would encourage criminals to commit the most heinous crimes and if apprehended, to provoke a personal attack upon themselves by the arresting or other officer to thereby avoid prosecution.

The position of the District Court, through the eyes of appellants may be stated briefly. The court below did not desire to permit Lozoya to be tried in the State Court for an offense arising out of acts by Lozoya for which he had been previously acquitted by the Federal Court. In effectuating this desire, the trial court abused its discretion by issuing an injunction which is vulnerable in many ways and is simply not supported by the evidence.

1. Appellee Is Not Subjected to Double Jeopardy by Threatened Prosecution by the State of California, Merely Because He Has Been Acquitted of a Related Crime in the Federal Courts.

One act may constitute an offense against two sovereignties for which each may prosecute.

Marteney v. United States, 218 F. 2d 258, cert. den. 348 U. S. 953;

United States v. Lanza, 260 U. S. 377, 382, 385;

United States v. McCain, 1 F. 2d 985.

The jurisdiction of the Federal Courts over a prosecution against one charged with unlawful possession of smoking opium is not exclusive. (*United States v. Ah Hung,* 243 Fed. 762.)

In the Lozoya case, the sale and transfer by Lozoya of approximately nine and one-half pounds of marijuana in the gunny sack which Lozoya removed from the trunk of his automobile and placed in the trunk of the govern-

ment vehicle of undisclosed federal narcotic agent Ramirez, one of the appellants herein, in the presence of the other appellants, was one act by Lozoya which is amenable to prosecution by both sovereigns; by the State of California, for violation of its laws proscribing illegal possession of marijuana, and by the federal government, for unlawful acquisition, without payment of the tax, and transfer of marijuana, without a written order.

One is not in jeopardy until the jury has been impaneled and sworn, and where the case is tried to the court without a jury, jeopardy begins after the court has begun to hear evidence.

McCarthy v. Zerbst, 85 F. 2d 640, 642.

"Jeopardy" attaches, within the provisions of the Fifth Amendment to the United States Constitution which provides that no person shall be subject for the same offense to be twice put in jeopardy of life or limb, when the accused has been subjected to a charge and the court has begun to hear evidence.

Clawans v. Rives, 104 F. 2d 240, 242.

On a plea of double jeopardy, defendant has the burden of proof.

Kastel v. United States, 23 F. 2d 156.

In the *Lozoya* case, Lozoya did not show that he was in double jeopardy. The State Preliminary Hearing was set for January 11, 1957, which was to occur subsequent to the federal injunction issued by the Honorable Thurmond Clarke on January 10, 1957. *A fortiori,* as the State Preliminary Hearing was prospective, the trial in the State Court had not commenced, no jury was im-

paneled or, if waived, no evidence was heard by the State Court, so Lozoya has never been in double jeopardy.

The defense, double or former jeopardy, would have been premature if asserted by Lozoya in the very State Court which contemplated trial of Lozoya. The proceedings in that court had not reached the stage of placing Lozoya in jeopardy.

It follows, as the night the day, that if the defense of double jeopardy could not have been asserted in the State forum, because Lozoya was not yet in jeopardy there, then the defense could not be asserted in the Federal Court where Lozoya has been tried once but where no other prosecution was pending.

A threatened second prosecution even before the same court does not constitute a placing in jeopardy. The injunction of appellants was based upon the District Court's erroneous belief that the trial of Lozoya in Federal Court permitted that Federal Court to enjoin appellants to avoid double jeopardy and end the matter [Tr. of Rec. pp. 464-465]. The injunction should be dissolved.

2. Appellee Is Not Subjected to Double Jeopardy by Threatened Prosecution by the State of California, Even Though Acquitted of a Related Federal Crime, Where Different Offenses Are Charged and Different Facts Are Necessary to a Conviction Under Each Statute.

Where two offenses are charged having relation to the same matter or transaction there is no double jeopardy if each offense requires proof of a fact which the other does not require.

> *Matthews v. Swope* (C. C. A. 9th), 111 F. 2d 697, 699.

The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense.

Gavieres v. United States, 220 U. S. 338, 342;
Poffenbarger v. United States, 20 F. 2d 42, 45;
United States v. Brimsdon, 23 F. Supp. 510, 512.

In *Lozoya,* the federal government was required to prove transfer by Lozoya of marijuana without a written order from the Secretary of the Treasury, in Count One, and acquisition of marijuana by Lozoya without payment of the tax, in Count Two. The State of California need prove only possession of marijuana by Lozoya.

The three offenses, the federal offenses of transfer and acquisition and the State offense, possession of marijuana, are separate offenses so that placing Lozoya in jeopardy for the two former federal offenses does not constitute former jeopardy with respect to the latter stated offense of possession which constitutes a violation of law of a different sovereign.

3. The Order Appealed From Is Void as to Certain Appellants Not Served With Notice of Hearing Below.

An injunction will not be heard without reasonable notice to the opposite party or his attorney.

State of New York v. State of Connecticut, 4 U. S. 1.

See also:

Gregory v. Pike, 79 Fed. 520.

Appellants Gullon and Miller were never served with Notice of Hearing *in re* the Order to Show Cause. The

United States Attorney filed a brief in opposition dated January 9, 1957 in which the United States Attorney purported to represent all five appellants. If there had been prior representation of appellants Gullon and Miller by the United States Attorney the brief would have indicated constructive knowledge of the hearing by counsel for these two appellants and have sufficed as sufficient constructive notice to them of the pending hearing. As these appellants have filed no independent pleadings, the Circuit Court may assume that these appellants have acquiesced in their representation by the United States Attorney and ratified the appearance in their behalf at said hearing.

4. The Marijuana Seized by the Narcotics Agents From Appellee Lozoya and Admitted by the Court Below Is Legal Competent Evidence.

If the District Court is found to have abused its discretion in issuing the injunction against the agents, *a fortiori,* that portion of the injunction concerning the marijuana evidence would be set aside. But in any event, this part of the order in itself represents an abuse of judicial discretion, being without any authority or basis.

No one, including Lozoya, has ever claimed the marijuana was obtained by unlawful search or seizure as in the *Rea* case, or by beatings or torture. Accordingly, the portion of the injunction was improper which ordered the evidence returned to the Clerk of the court after having been properly withdrawn from evidence pursuant to the local court rules.

In this regard, the *Rea* case held:

> "all property taken or detained under any revenue law of the United States shall not be repleviable,

but shall be deemed to be in the custody of the law and subject only to the orders and decree of the courts of the United States having jurisdiction thereof."

The apparent purpose of the statute is to provide against the return of contraband to the defendant, but it does not establish any rule concerning its disposition. Further, Lozoya never attempted to replevy the marijuana.

The statutes do not contemplate that the judiciary should be the final depository or disposing agency for contraband such as the marijuana in question here. In fact, it is specifically provided for in 26 U. S. C. 4745 (I. R. C. 1954) that marijuana seized or coming into possession of the United States, where the owners are unknown, shall be confiscated and forfeited to the United States (par. (b)), and the Secretary of the Treasury is authorized to destroy any such marijuana or to deliver it to any department or agency of the United States (par. (c)). From this statute it is apparent that Congress intended that the executive branch, specifically the Treasury Department, should have the authority to dispose of illegal marijuana. Since in this particular matter the owner or owners of the marijuana in question are technically unknown (at least no court has yet found any person responsible for it), the Treasury Department would seem to be the only body authorized to take possession of it.

The defendant would be subjected to no injustices were he to be prosecuted in State Court and he would not be the victim of any illegal acts thereby. In fact, in attempting to have him prosecuted in State Court the

Bureau of Narcotics is carrying out the express mandate of the Congress, as set forth in 21 U. S. C. 198. This statute provides, among other things,

> "The Secretary of the Tresaury shall cooperate with the several States in the suppression of the abuse of narcotic drugs in their respective jurisdictions, and to that end he is authorized . . . to arrange for the exchange of information concerning the use and abuse of narcotic drugs in said States and for cooperation in the institution and prosecution of cases in the courts of the United States and before the licensing boards and courts of the several States. . . ."

In carrying out this policy of cooperation with the State authorities in the enforcement of narcotics laws, it is of course unnecessary for the Treasury Department permanently to transfer contraband to the State authorities. In fact, contraband used as evidence in State proceedings is in effect merely loaned to the State authorities for the purpose of the particular case. Upon completion of the proceedings, the evidence is returned to the Narcotics Bureau for routine disposition pursuant to the statutes and Treasury regulations.

The first paragraph of Rule 20(a), Local Rules of the United States District Court for the Southern District of California provides for return of exhibits as follows:

> ". . . all . . . exhibits, . . . filed in any cause, shall, . . . be returned to the party or person to whom they belong, . . ."

Subsequent to acquittal of Lozoya it was normal and proper for the government to withdraw the marijuana from evidence pursuant to local rule 20(a) but the Dis-

trict Court, subsequently exceeded its authority when it ordered the return of the marijuana to the Clerk of the Court. Of course, the Bureau complied with the order and returned the approximately 9½ pounds of marijuana to the clerk on January 11, 1957 [Tr. of Rec. pp. 46-47].

The order of the trial court with respect to the evidence should be vacated and the evidence ordered returned to the Secretary of the Treasury or his representative for any use provided by law including an offer into evidence in any state proceeding.

5. The Order Appealed From Is Not Supported by the Evidence.

The burden is upon the person contending double jeopardy to make out his case.

Kastel v. United States, supra.

Lozoya did not show at the hearing or elsewhere that he was then in double jeopardy. He having failed in this regard, the injunction should be dissolved. Concerning when a defendant is in second or double jeopardy this subject was discussed in paragraph IV, subparagraph 1, *supra.*

If alleged beatings and torture are the predicate for the injunction, the evidence at the hearing and, if before the court at the hearing, the evidence from the trial utterly fails to support any finding that appellants Ramirez, Goodman or Freeman were present at or took part in any alleged beating or torture of Lozoya. Therefore, the injunction should be dissolved as to said appellants. It should also be dissolved, as to appellant Miller who did not strike Lozoya, and dissolved as to appellant Gullon who struck Lozoya during an unsuccessful attempt to obtain Lozoya's fingerprints.

6. The Order Appealed From Is Not Supported by, nor Responsive to Appellee's Petition.

The petition of Lozoya asserts an alleged deprivation of due process of law in violation of the Fifth and Fourteenth Amendments [Tr. of Rec. p. 32, par. XVI] and that by the arrest of Lozoya he has been twice placed in jeopardy [Tr. of Rec. p. 33, par. XVIII] as being the basis for issuance of the injunction prayed for. The injunction is apparently purportedly based upon a finding of beatings and torture and is not responsive to the petition which is strangely devoid of any reference to alleged beating or torture of Lozoya.

An injunction will not issue against a person not within or subject to the jurisdiction of court.

> *Clarke v. Boysen,* 39 F. 2d 800, Cert. den. 282, U. S. 869.

An injunction will not be heard without reasonable notice of the hearing to the party enjoined.

> *State of New York v. State of Connecticut,* 4 U. S. 1.

The injunction provided in conclusion, ". . . and all persons are restrained from ordering and compelling the parties enjoined herein from testifying in any proceedings."

In effect and fact, the injunction purports to enjoin the State Court and Judges thereof from compelling by subpoena the attendance of appellants as witnesses at the State trial of Lozoya.

As the State Court was not subject to the jurisdiction of the District Court and was not served with Notice of the Hearing or represented there by counsel, that portion of

the injunction which purports to restrain the State Court should be dissolved. Compare *Toucey v. New York Life Ins. Co.,* 314 U. S. 118, discussed *supra,* which reveals the repugnance with which the Supreme Court viewed the injunction issued by a Federal District Court enjoining a proceeding *in personam* in a State Court on the ground, as found by the District Court, that their civil claim in controversy had been previously adjudicated by the Federal Court. The Supreme Court reversed the District Court stating that in general the writ of injunction should not be granted by any court of the United States to stay a proceeding in any court of a State—to prevent needless friction between State and Federal Courts.

In the Lozoya case as elsewhere, the California State Courts are surely capable of determining accurately and fairly the questions arising there in a trial of Lozoya including the defense of former or double jeopardy when and if asserted there by Lozoya at the appropriate time.

7. The Court Below Deprived Appellants of Their Right to a Fair Hearing.

The Petition was filed and the Order to Show Cause issued on Friday, January 4, 1957. The hearing thereon was set for the following Thursday, January 10, 1957.

On January 9, 1957, appellants filed their Brief in Opposition and Points and Authorities, within the period of time provided by Rule 3 (d), of Rules of the United States District Court for the Southern District of California.

When the Court took the bench for the hearing January 10, 1957, it stated during the hearing that it had spent

the weekend, meaning January 4, 5 and 6, 1957, researching the law, and had prepared a written order.

The Court had not seen or read appellant's Brief or Points and Authorities in Opposition prior to the hearing.

During the argument by counsel for appellants the court was handed the Brief in Opposition [Tr. of Rec. p. 461] and did not read the Brief nor permit counsel for appellants to fully argue the matters contained in the Brief. The colloquy was as follows:

> "Mr. Bender: Has your Honor had an opportunity to peruse the brief to the extent of seeing that no constitutional guarantee like the Fifth Amendment—
>
> The Court: Mr. Bender, can't you take the Court's word for it that I worked all weekend on this particular case?
>
> Mr. Bender: Yes, your Honor, but you were just handed the brief in opposition.
>
> The Court: Yes, but I am a graduate of a law school, you know. I say I worked all weekend on this particular case and researched the matter. I spent hours on it.
>
> Mr. Bender: Yes, your Honor."

The Court below commenced the hearing in the morning at 10:00 A. M., on January 10, 1957 and should have recessed the hearing long enough to read and consider the timely filed brief and points and authorities in opposition by appellants, before concluding the hearing and giving its decision. Pages 455 to 466, inclusive, of the Transcript of Record, concern the hearing of January 10, 1957.

8 The Allegations of Torture in the Order Appealed From Are Not Supported by the Evidence.

"Torture" specifically means: the act of inflicting severe pain under the orders of a court of justice, royal commission, ecclesiastical organization, or other legal or self-constituted judge or authority, especially as a supposed means of extorting the truth from an accused person; the pain so inflicted; torment by means of the rack or other contrivances for inflicting physical pain, employed for the purpose of extorting confessions; the act of inflicting severe pain as a means of persuasion; the infliction of severe bodily pain either as a punishment or for the purpose of revenge or for the purpose of compelling the person tortured to give evidence or make confessions in judicial proceedings; the act or process of inflicting severe pain, especially, as a punishment, in order to extort a confession, or in revenge; specifically, the act of inflicting such pain under judicial or other authoritative order, as by water or fire, by the boot or thumbscrew, by the rack or wheel, and so forth.

Townsend v. People, 111 P. 2d 236, 239.

The injunction recites that appellants tortured Lozoya. There is no evidence of torture of Lozoya. If the evidence taken during the trial of Lozoya were properly before the court in its consideration of the injunction, and taken in a light most favorable to Lozoya, it does not show that appellants Ramirez, Goodman or Freeman ever struck Lozoya or were present when the altercation occured. The possible identification of appellant Miller as being the person whom Lozoya described beat Lozoya is tenuous and uncertain. Appellant Miller himself testified as a government witness for the first time on rebuttal. Lozoya never pointed to the individual, Miller, and identified him

as being the person whom Lozoya described allegedly beat and kicked Lozoya. Assuming for argument only that appellant Miller did the things ascribed to him by Lozoya, and conceeding that appellant Gullon struck Lozoya two or three times, the evidence nevertheless fails to disclose that this amounted to torture.

Parenthetically, recall for the moment that the sale and transfer of a gunny sack full of marijuana by Lozoya to one treasury agent occurred in the daylight in the presence and under the scrutiny of four other agents. Appellants, at the time of the alleged torture of Lozoya not only did not torture him but had no reason to torture him in the hope he would confess that which they had just observed take place. Even in retrospect, after acquittal of Lozoya by the Federal Court apparently for lack of evidence to overcome the presumption of innocence [Tr. of Rec. p. 454], it does not follow that appellants tortured Lozoya in the belief that a confession by Lozoya would have over-balanced the presumption of innocence where the testimony of five percipient witnesses to the offense failed. Further, it may be assumed that all treasury agents including appellants then knew that an involuntary confession is not admissible into evidence. Appellants had what they must have considered to have been a "cold" case against Lozoya. They had every reason to do nothing to endanger the case by the beating or torture of Lozoya.

At the same time, Agent Gullon had a duty to perform. He was to take the fingerprints of Lozoya. When it appeared the resistance of Lozoya might materialize into a possible escape, it was also the duty of Gullon to immediately discourage this aggressive attitude forming in the mind of Lozoya while in the interrogation room. The decision of appellant Gullon, right or wrong, should

not be judged as having occurred in the calm aura of the judicial chambers but in the light of the circumstances then reasonably apparent to Gullon who was alone with a defendant who had just unlawfully sold an enormous quantity of narcotics and who having refused by physical force to submit to the taking of his fingerprints could have diverted his energies toward escape unless subjugated to the will of the agent and hancuffed to the chair as Agent Gullon proceeded to do.

9. The Allegations of the Order That Appellee Was Subjected to Beating by Appellants Are Not Supported in Any Way by the Evidence as to Certain Appellants.

If it be assumed that the testimony from the trial was properly before the court in its consideration of the injunction, there was no evidence that appellants Ramirez, Goodman or Freeman were present during the altercation in the federal building in which Lozoya alleges he was beaten by appellants Gullon and Miller. Accordingly, the injunction as to these appellants must be dissolved as not supported in any way by the evidence.

10. The Alleged Beatings Administered by the Appellants Are Alleged to Have Occurred Subsequent to the Seizure of the Marijuana, and Have No Bearing on the Commission of the Crime Charged.

If treasury agents were to beat or torture a defendant whom they apprehended, the agents should be prosecuted for violation of the civil rights of the defendant but the beating or torture would not wrap the defendant in a cloak of immunity from prosecution for the prior offense.

In the Lozoya case, although the injunction recites that "from the time of his first detection, and including his

arrest, . . . and search and seizure of marijuana" Lozoya was beaten and tortured, the evidence, if properly considered by the Court in connection with the injunction, shows that the altercation or scuffle occurred in the interrogation room subsequent to the sale and transfer of the marijuana, arrest of Lozoya, and the taking of the sack of marijuana into custody. Surely a later alleged beating and torture does not relate back to vitiate the admissibility of unquestioned antecedent testimony. If so, Lozoya has learned as others may, to inveigle the arresting officer into the use of force and to thereby evade payment of the debt owed to society.

To hypothesize: if Lozoya had confessed or admitted anything of an incriminatory nature in connection with the sale or transfer of the marijuana in question, while he was in the interrogation room, the trial court in the wise exercise of judicial discretion might well have declined to receive testimony of the confession or admission so obtained and gaze with keen eyes upon any subsequently obtained admission or confession. But such is not the case in Lozoya where all of the evidence of sale and transfer of marijuana was obtained before the alleged beating except evidence of one tacit admission by Lozoya to Agent Ramirez made later in the County jail.

Conclusion.

The trial court abused its discretion in granting the permanent injunction against appellants, as well as other persons who were not before the court, and in invading the province of the Secretary of the Treasury who alone or by his delegates has the power of disposition of narcotics subsequent to federal trial and withdrawal of the substance from evidence.

An adequate legal remedy existed and this is the primary test of equitable jurisdiction to grant a permanent injunction. Lozoya could assert the alleged defense, former jeopardy, when actually placed in jeopardy by the State of California.

The injunction could be a dangerous precedent as an unjustified interference by the Federal District Court with State law enforcement and prosecution by the state of violations of its laws. It is an unwarranted extension and interpretation of the *Rea* doctrine which will inhibit proper law enforcement and discourage desirable cooperation between federal and state authorities and law enforcement agencies in the future unless dissolved.

Lozoya has never been placed in second or double jeopardy so an injunction on this basis is premature in any court and may only be asserted at an appropriate time in the State or other court which brings Lozoya to an alleged second trial and places him in jeopardy for the same offense for which Lozoya was previously in jeopardy.

Existing law provides that a person may be tried in succession by Federal and then State prosecution, or in inverse order. However, it is not necessary to rely upon the *Lanza* and other cases which support this rule because the attempted and envisaged prosecution of Lozoya by the State of California is for a different offense arising out of the same acts.

If the bases for the injunction be alleged beatings and torture of Lozoya by appellants, three of the appellants were not present at the alleged beatings. With no evidence in support thereof, these three appellants, Ramirez, Goodman and Freeman were wrongfully found to have beaten and tortured Lozoya. Similarly, the State Courts

should not have been enjoined and were not even before the court below.

It is respectfully submitted that the Court below abused its discretion in granting the injunction, that its discretion was exercised to an end not justified by any evidence before it at the hearing or the testimony from the trial and that the injunction is clearly against logic and should be dissolved.

LAUGHLIN E. WATERS,
United States Attorney,

LLOYD F. DUNN,
Assistant U. S. Attorney,
Chief of Criminal Division,

JOSEPH F. BENDER,
Assistant U. S. Attorney,

Attorneys for Appellants.